NO. 80-5986

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ROOSEVELT GREEN, JR.,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1.

Was evidence which showed, among other things, that Green was present when the fatal shots were fired, may have fired the fatal shots, and later bragged about killing the victim, sufficient to establish all elements of the offense, including intent, and authorize the death penalty?

2.

Was certain physical evidence which established the cause, nature and extent of injury to the victim and aided in establishing one of the statutory aggravating circumstances properly admitted?

3.

Was it error for the trial court not to allow defense counsel to interrupt the orderly presentation of evidence by the state for purposes of presenting ostensibly mitigating evidence, particularly when the trial court gave reasonable alternative means of presenting such testimony?

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PART ONE

STATEMENT OF THE CASE

Petitioner, Roosevelt Green, Jr., petitions this Court for the second time. Green was convicted for the murder of Teresa Carol Allen on January 27, 1978, and sentenced to death. The conviction and sentence were affirmed in Green v. State, 242 Ga. 261, 249 S.E.2d 1 (1978). This Court set aside the death sentence in Green v. Georgia, ___U.S.___, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979). The Supreme Court of Georgia remanded to the trial court with direction to retry the sentencing portion of the trial. Green v. State, 244 Ga. 27, 257 S.E.2d 543 (1979).

On November 10, 1979, after six days of jury selection and trial, Green was sentenced to death for the second time. The jury found as aggravating circumstances (1) that the murder was committed while the offender was engaged in the commission of another capital felony, to wit: kidnapping; (2) that the offense of murder was committed while the offender was engaged in the commission of another capital felony, to wit: armed robbery; and (3) that the murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture, depravity of mind and aggravated battery to the victim. See Ga. Code Ann. § 27-2534.1(b)(2) and (7). Green's conviction and sentence were again affirmed on direct appeal. Green v. State, 246 Ga. 598, ___S.E.2d___(1980).

From that adverse decision Petitioner files this petition for a writ of certiorari.

The facts of Green's crime are gruesome. Briefly, Green and his companion, Carzell Moore, [1] abducted eighteen-year-old Teresa

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[1] Moore's conviction and death sentence have been affirmed. Moore v. State, 240 Ga. 807, 243 S.E.2d 1 (1978). Moore has also sought and been denied habeas corpus relief in the courts of Georgia; this Court has denied his petition for a writ of certiorari in Moore v. Zant, Case No. 79-6188 (denied May 12, 1980, rehearing denied August 11, 1980).

Carol Allen from her place of part-time employment.

> Once in the victim's car, appellant turned to the victim and said, "Bitch, take off your clothes." The victim pleaded that she was a virgin and not to rape her. While no body fluids of the appellant's blood type were found, testimony established sexual abuse of the victim by the appellant. Thereafter, appellant changed places with Moore who was driving the victim's car, and Moore raped the victim so forcibly as to tear her vagina. The victim was then shot twice by a high powered rifle. The first shot to the body did not kill the victim but caused severe and disfiguring injuries to the abdomen, forearm and wrist. She was shot a second time in the face causing portions of the same to be literally blown to pieces. Death ensued from loss of blood. There was testimony that she was lying on the ground "moaning or crying" when the second shot was fired.

Green v. State, 246 Ga. at 607.

If necessary to address adequately any issue raised in the petition, Respondent will include additional facts in the remaining portions of this brief.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. EVIDENCE WHICH SHOWED, AMONG OTHER THINGS, THAT GREEN WAS PRESENT WHEN THE FATAL SHOTS WERE FIRED, MAY HAVE FIRED THE FATAL SHOTS, AND LATER BRAGGED ABOUT KILLING THE VICTIM, WAS SUFFICIENT TO ESTABLISH ALL ELEMENTS OF THE OFFENSE, INCLUDING INTENT, AND AUTHORIZED THE DEATH PENALTY.

Green contends his death sentence is inappropriate because there was no showing that he intended to cause the death of the victim. Appellant claims that Carzell Moore, not he, committed the murder.

The question posited by Petitioner is based upon a serious misreading of the evidence presented and the jury's findings. To say that Green did not intend to cause the death of the victim is to ignore the evidence presented at trial and reviewed by the Supreme Court of Georgia on appeal.

The briefest review of evidence squarely contradicts Petitioner's hypothesis. Appellant apparently bases his assertion primarily on the testimony of one Thomas Pasby who testified to conversations between him and Carzell Moore in which Moore stated he had shot the girl. Pasby also testified that Moore told him:

> . . . Green turned around and looked at the girl and said, "Bitch, take off your clothes."

> . . . He said that both of them raped her and then they -- I guess they went on and then he said that they got to some place off the road, in the country or something and that he told Green to go get some gas and then he shot her once and then he said he shot her again and then when Green came back, they picked her up and threw her in the bushes.

(T. 912-13). On direct examination, Doretha Livingston testified that she was with Roosevelt Green during the week of December 13, 1976, at which time Green told her that, "he had shot a girl somewhere in Georgia." (T. 940). Green never mentioned Carzell Moore to her.

When Green was apprehended in South Carolina he was driving the victim's car; the murder weapon was in his possession when he arrived in South Carolina.

Having reviewed this and all other evidence presented at trial, the Supreme Court of Georgia found:

> A rational trier of fact, however, could have found from the record, beyond a reasonable doubt, that the appellant either shot the victim or was present when it occurred. [Jackson v. Virginia, 443 U.S. 307 (1979)]. There was evidence that the appellant bragged that he had killed the victim. Gloves found at the murder scene had hair on them similar to both the appellant's

and the victim's. There was no evidence presented as to what type of shoe the appellant was wearing at the actual time of the murder. Furthermore, a black male, with another black male as a passenger, was seen driving an automobile similar to the victim's (with only the letters RENS showing on the tag) into a gas station near the scene of the crime.

Cases cited by the appellant, Hall v. State, 241 Ga. 252, 244 S.E.2d 833 (1978) and Hill v. State, 237 Ga. 794, 229 S.E.2d 737 (1976) are not applicable here. In those cases, one party to a crime received a life sentence while another received a death sentence. Here both defendants received a death sentence.

The evidence most favorable to the defense shows that the appellant actively and knowingly participated in the entire criminal enterprise including the robbery, kidnapping and rape of the victim. He left her on a lonely rural road on a cold wet night with a person he knew to be armed and violent. He went for gas and when he returned he helped throw her mutilated body into the underbrush. He then took some of

> the stolen money, the victim's car and the murder weapon and fled the state. The defendant's participation in the murder cannot, on any reasonable basis, be termed minor. [citations omitted]. The record simply does not support the appellant's argument . . . .

Green v. State, 246 Ga. at 608. From the last paragraph quoted above, it is plain that even when the evidence is reviewed in the light most favorable to Green, an exercise not required either by state or federal law, a rational trier of fact still can find him guilty of the offense charged. A fortiori, viewing the evidence in the proper prospective requires the same finding.

II. CERTAIN PHYSICAL EVIDENCE WHICH ESTABLISHED THE CAUSE, NATURE AND EXTENT OF INJURY TO THE VICTIM AND AIDED IN ESTABLISHING ONE OF THE STATUTORY AGGRAVATING CIRCUMSTANCES WAS PROPERLY ADMITTED.

Petitioner's second assertion is that evidence of portions of the victim's body was improperly admitted and inflammatory. The same issue was raised in Green's original appeal wherein the Supreme Court of Georgia held:

> Exhibits 26, 27, and 28 being pieces of flesh, bone, and teeth, because of their proximity to the lead jacket and cartridge cases fired from the rifle were relevant for the jury's consideration of the causal connection between the rifle possessed by the appellant, the cartridges fired therefrom and injuries to the victim.

Green v. State, 242 Ga. at 267. During the sentencing phase of trial, the nature and extent of the damage done to the victim's body were important considerations in determining the appropriate penalty to be imposed. The evidence did precisely that.

Moreover, one of the statutory aggravating circumstances requiring specific proof by the state was Ga. Code Ann. § 27-2534.1 (b)(7). When presented a crime as brutal, inhuman, and horrifying as that committed by Petitioner, Respondent agrees that the evidence will reflect those unpalatable characteristics of the crime. Those are the very characteristics that distinguish certain murders from those which unfortunately have come to be

known as routine or ordinary murders. However, as this Court held in Godfrey v. Georgia, 446 U.S.___, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), in order for Ga. Code Ann. § 27-2534.1(b)(7) to be constitutionally applied, the evidence presented at trial must satisfy certain specific criteria. In its mandatory statutory review, the Supreme Court of Georgia must have "independently assessed the evidence of record and determined that such evidence supports the trial judge's or jury's finding of an aggravating circumstance." Godfrey v. Georgia, 100 S.Ct. at 1765.

In the present case, a vicious act was committed. The results of that act were not pleasant. But the evidence was necessary to enable the jury to make an informed decision on whether the acts of Roosevelt Green were of that magnitude authorizing imposition of the death penalty under Ga. Code Ann. § 27-2534.1(b)(7) and Godfrey v. Georgia, supra.

It bears repeating that in this case, unlike Godfrey, the victim suffered extensive bodily injury, proved by the physical evidence to which Petitioner objects, but died an agonizing death actually caused by loss of blood. That evidence was necessary for the prosecution to establish the severity of her injuries and properly was admitted.

III. IT WAS NOT ERROR FOR THE TRIAL COURT NOT TO ALLOW DEFENSE COUNSEL TO INTERRUPT THE ORDERLY PRESENTATION OF EVIDENCE BY THE STATE FOR PURPOSES OF PRESENTING OSTENSIBLY MITIGATING EVIDENCE, PARTICULARLY WHEN THE TRIAL COURT GAVE REASONABLE ALTERNATIVE MEANS OF PRESENTING SUCH TESTIMONY.

In his third enumeration, Petitioner would have this Court believe that he was denied the opportunity to present mitigating testimony because of a technicality. The allegation is unwarranted. A review of the evidence shows that the testimony of Father James was not presented because Petitioner chose not to present it, even though the trial court went to great lengths to accommodate the witness' schedule.

The circumstances, succinctly stated by the Supreme Court of Georgia, were:

> The appellant subpoenaed an out-of-state witness, Father William James, who had been head of the foster home in which the appellant had lived. When the court was informed that the witness might not be able to testify in sequence, that is, after the state rested, the court stated, "I don't want to break into the State's case, but I will let you put a stipulation into the record. . . If the State's not through I will send the jury to the room and put him up. . . and let him be cross

> examined and then at the proper time, I will let you introduce that record." The defense counsel acquiesced. However, when the witness arrived, the defense counsel instead of addressing the court, asked the district attorney to participate in a deposition. The district attorney refused, and the witness left the state.
>
> The appellant argues that the refusal of the district attorney to participate in a deposition deprived him of an important mitigating witness. We do not agree. The trial court had formulated a device, upon agreement of defense counsel, to preserve the desired testimony without interrupting the orderly sequence of the trial, and the complained of deprivation was the result of defense counsel's failure to comply with the trial court's reasonable discretion. . . .

Green v. State, 246 Ga. at 601-02. Further review of the entire transcript shows that the defendant never made an effort to call Father James to the witness stand or to take his deposition. The taking of the deposition was not contingent on the district attorney's agreeing to it. The trial court had simply stated that the district attorney should have the opportunity to cross-examine the witness. If the district attorney did not choose to be present for any cross-examination it was well within his power to decline to attend. However, the defendant apparently made no effort whatsoever to preserve the testimony of Father

James. Furthermore, nowhere in the record does the substance of what that testimony would have been appear other than an unspecific reference to Father James' "relationship with the defendant and how he has known the defendant in the past." (T. 19). One can only presume that Father James' testimony would have concerned Green's background and childhood. However, Green's mother and sister testified in his behalf and gave evidence of his background.

Petitioner was given every opportunity short of disrupting the trial to present the testimony of Father James. That he did not do so was for no other reason than that he chose not to do so. To place the blame for his failure on the trial court or the prosecution overlooks his own responsibility.

IV. THE JURY PROPERLY WAS ALLOWED TO CONSIDER THOSE STATUTORY AGGRAVATING CIRCUMSTANCES SUPPORTED BY THE EVIDENCE.

In his final issue, Petitioner attempts to inject an issue of double jeopardy. Petitioner contends that an aggravating circumstance not specified by the jury at his first sentencing trial cannot be considered by a jury on retrial of the sentencing phase.

Petitioner's argument reflects a basic misunderstanding of the nature and purpose of statutory aggravating circumstances. The precise issue has been addressed by the Supreme Court of Georgia and properly decided adversely to Petitioner. In Redd v. State, 242 Ga. 876, 885, 252 S.E.2d 383 (1979), the court said, ". . . statutory aggravating circumstances as charged to the jury and as set forth in Code Ann. § 27-2534.1(b)(1-10) are not offenses within the meaning of the double jeopardy clause but are charged a jury in order to guide them in their determination of whether a defendant should be given a life or a death sentence." (emphasis in original).

One is not indicted for aggravating circumstances, nor is one acquitted of aggravating circumstances. Aggravating circumstances are instructed to the jury based upon the evidence presented at trial. The evidence presented to the jury that sentenced Petitioner to death was reviewed fully by the Supreme Court of Georgia which correctly found ample record support for those statutory aggravating circumstances.

CONCLUSION

No sufficient reasons having been presented, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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